

**EMGT 835 FIELD PROJECT:**

***The Use of Standard Forms  
by a Small to Mid-Size Consulting Company***

**By**

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## **Executive Summary**

The benefits of standards forms are widely promoted and acknowledged by project owners, design professionals and contractors. But, are they being used as intended? The documents seem particularly beneficial to small and mid-size companies, who may not have the capability to employ legal counsel extensively to draft, review and negotiate the many forms used for projects. This paper researches Consulting Company A's, a relatively small consulting firm, use of standard documents to determine if they are used as intended by the producers of the forms and industry experts.

The research concludes that Consulting Company A's project managers and legal counsel do have a basic understanding of industry standardized documents. Some employees also understand the prescribed methods for modifying standard forms, and the differences among forms produced by organizations representing specific industry disciplines. However, despite having a general familiarity of standard documents they are rarely used by Consulting Company A as intended by their producers, and apparently are not considered an important aspect of conducting business.

The primary reason for not promoting the use of standard forms within Consulting Company A is a misunderstanding of the role legal counsel provides in reviewing project forms. Project managers expect legal counsel to make recommendations such as using standard forms, however legal counsel does not consider it appropriate to recommend any forms or language other than Consulting Company A's internally developed agreement form even when it believes their use may be beneficial.

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## Section 1. Introduction

Several professional organizations produce standard documents, such as agreements, pay applications and certifications for use in construction projects. The benefits for using standards forms are widely promoted and acknowledged by project owners, design professionals and contractors. Although the documents are produced by organizations representing specific industry disciplines with inherent biases, considerable coordination and concessions among producers have resulted in documents that are generally accepted as fair for the parties using them (*Pipeline par 1, EJCDC website, AIA website, AGC website*). These standard documents are intended to be modified to suit the unique aspects of each project, and there are standard methods for modifications that allow both sides to clearly see changes and be confident in the fairness of the final document produced.

The consensus among experts of virtually all construction industry related disciplines is that these standard documents are a valuable resource (Construction Law Handbook 335-336). But, are they being used by companies as intended? Do the practitioners these documents are intended to benefit understand how to appropriately use them? The documents seem particularly beneficial to small and mid-size companies, who may not have the capability of using legal counsel extensively to draft, review and negotiate the many forms used for small projects. This paper researches a relatively small to mid-size engineering company's use of standard documents to determine if they are used as intended by the producers of the forms and industry experts.

Specifically this paper seeks to determine the basic familiarity the company's employees have with standard documents, and their prescribed methods for modifying. The use of standard documents as a negotiating aid as recommended by experts is assessed, as is the company's general philosophy in balancing risk and reward associated with accepting less than ideal language.

The three most commonly used construction industry standard forms will be discussed, along with an overview of their biases and the appropriate methods of altering them. The understanding of the inherent biases of these documents by company's employees is also researched.

## Section 2. Literature Research

### Standard Documents Review

There are over 100 American Institute of Architects (AIA) standard forms, and it is the oldest and most commonly used standard in the United States construction industry. Many practices common in the construction industry today became established through their inclusion in AIA documents. Examples include arbitration, the one-year correction period, and the architect's role in deciding disputes (*AIA Website, About AIA*).

**AIA** documents are frequently updated. Recent additions include design-build and international standards. AIA documents are not specific to any one state. They provide a solid basis of contract provisions enforceable under the law. Case law regarding contracts for design and construction has, for the past century, been based largely on the language of AIA standardized documents and contracts derived from them. As a result, there is a misconception among many in the construction industry that these standard forms should not be modified. However, AIA intends the forms to be modified as needed to fit the specific circumstances of projects (*See Appendix A: AIA Contract Documents Synopses*).

To facilitate the drafting of project specific forms, the AIA and other producers of standard documents, prescribe standard methods for modifying their forms. These include strikethroughs clearly showing language removed from the producer's standard form, and underlines of added language. AIA also produces software for properly making modifications to its documents.

For more than 30 years, the Engineers Joint Contract Documents Committee (**EJCDC**)-a coalition of stakeholders in the project delivery process- have been developing contract documents.

EJCDC documents reflect the experience and knowledge of the many engineers, owners, contractors, and other construction-related professionals who comprise the committee (*EJCDC Policies and Procedures*). (Note that architects are not listed as part of the committee). EJCDC forms are recommended by major engineering companies and public works associations (*AWWA Construction Contract Administration*).

In September 2007 a set of documents called “**ConsensusDOCS**” were published with the intention of replacing EJCDC and AIA as the defining documents of the responsibilities and obligations of the construction team. The ConsensusDOCS were based on the Associated General Contractors of America (AGC) standard forms, and represent the construction industry’s efforts to correct issues they have with the more established AIA and EJCDC forms.

AGC’s stated purpose of the new documents, which took three years to draft, was to “draft contract documents that focus on the best interests of a construction project, rather than favoring one party or another.” Neither AIA nor EJCDC support the ConsensusDOCS.

The key issues addressed by the ConsensusDOCS are risk allocation, indemnity, consequential damages, liquidated damages, dispute resolution, and payments. The forms are divided into General Contracting, Collaborative Documents, Design-Build, Construction Management at Risk, Subcontracting and Program Management categories. The scope covered by the ConsensusDOCS is similar to that of AIA or EJCDC, (*Design-Build 5*).



## Industry Experts Recommendations

Marc Richardson is a senior attorney with Burns of McDonnell Engineering Company, has an MBA, and is a registered professional engineer. Mr. Richardson currently serves as Chair of the Missouri Bar Construction Law Committee, and is an engineering management lecturer at the University of Kansas. Mr. Richardson's fall 2007 "Contract Law" class lectures often discussed contract language negotiations, and the usefulness of referencing standard documents as a baseline for discussing the fairness or appropriateness of agreement language.

The use of industry accepted standard agreements, according to Richardson, can be suggested by a party who deems the proposed agreement of the other party unacceptable. Alternatively, if only portions of an agreement are deemed inappropriate, the corresponding section of the standard agreement may be referenced as acceptable language to be substituted.

In the book "Managing Risk Through Contract Language", Victor Schinnerer gives similar recommendations to reference standard documents when negotiating agreement language. Schinnerer identifies common topics that arise in contract negotiations, and provides suggested responses. As additional commentary to the responses the appropriate EJCDC and AIA documents are included that may be forwarded to the other party as a suggested alternative, or referenced for acceptable language for certain sections (*Managing Risk Through Contract Language* 2-3).

Schinnerer endorses the use of standard documents for their fairness to all sides, and identifies AIA and EJCDC as the two most commonly accepted standards, for which he served as insurance counsel for each at the time of publication. According to Schinnerer, "What is valuable about the standard documents is not that they address very specific need, but that they clearly set forth the services that design professionals are qualified to perform and document a rational expectation of professional performance. The standard documents systematically detail what may be expected from all parties and describe a nationally accepted norm for professional services. The careful attention paid in the drafting process to defining the divisions of duties and responsibilities between the parties to the professional service agreements, and in the coordination of the construction contracts and forms with the professional service agreements makes the documents valuable both in use and for comparison with custom-drafted or client-generated agreements."

Both Richardson and Schinnerer note the confidence many have in standard forms that there can be no hidden or disguised risk, because the producers of these documents have also standardized methods for altering them that allow for changes to be clearly shown. Managing Risk Through Contract Language stresses the importance of design professionals to obtain legal counsel for any document changes (*Managing Risk Through Contract Language 4*).

Articles or publications researched for this paper did not include the use of standard construction industry documents by small consulting companies. Further, no reports of whether standard forms are being used as intended by companies were found. Therefore, it is believed that the following research done for this paper is unique.

### **Section 3. Procedure and Methodology**

The forms discussed in this paper are those presented to Consulting Company A on past projects. A multiple choice survey was conducted via e-mail for those within the four Kansas City regional Consulting Company A offices that draft, review or sign agreements and other project forms. This survey was intended to represent the general understanding of the company's employees using standard forms, or documents based on standard forms. The survey also includes questions indicating how important Consulting Company A employees consider the language used in forms they sign in light of the limited scope and fees common on the firm's projects. Other original research includes multiple case studies of correspondence between project managers, Consulting Company A legal counsel and its insurer Insurance Company A. An interview was conducted with the Law Firm A attorney serving as legal counsel to Consulting Company A regarding the use of standard forms by the company.

#### **Consulting Company A Overview**

This paper is intended to be utilized for future research regarding the use of standard documents by small to mid-size firms. To assist in categorizing and comparing Consulting Company A to other companies the following financial and services overview of the company is provided. Although Consulting Company A is owned by Parent Company A it comprises over 90% of the total enterprise. Further, most of the companies owned by Parent Company A either support Consulting Company A, such as the company planes, or are managed directly by Consulting Company A, such as the property development ventures. Therefore, Parent Company A and Consulting Company A can be viewed synonymously.

Parent Company A and its wholly-owned subsidiary, Consulting Company A, engage in the consulting engineering business with offices in Lincoln, Omaha, Grand Island, Holdrege, Scottsbluff and South

Sioux, Nebraska; Overland Park and Manhattan Kansas; Riverside and Springfield, Missouri; Phoenix and Tucson, Arizona; Edina, Minnesota; Sioux City, Iowa, and Denver, Colorado. Its primary consulting services are in the fields of civil, land planning, structural, survey, transportation, electrical/mechanical and environmental engineering. In the fall of 2008 Consulting Company A acquired Compliance Company A, a Colorado-based environmental sciences and engineering consulting firm. Compliance Company A will maintain its offices in Golden and Grand Junction, and all staff members will remain with the firm.

A major portion of their contracts are with municipal governments, natural resource distribution districts and various private developers. Parent Company A, Inc. owns Consulting Company A Air, LLC which pays the salaries and expenses of the pilots who fly the Company's corporate airplane, and a 50% interest in PlaneCo, LLC which is involved in the maintenance and ownership of an airplane. The Company also wholly-owns DC Design – Build, LLC, HL Design – Build, LLC and HH Development, LLC. These LLCs are involved in the development of real estate for residential and commercial use. The financial statements of Parent Company A include the accounts of the Company and its subsidiaries (*Consulting Company A's Website*). A financial ratio analysis of Parent Company A is included in Appendix B to allow comparisons of Consulting Company A with other companies (*See Section 5: Suggestions for Additional Work*).

## Consulting Company A Survey

A survey with ten multiple choice questions was distributed between February 27, 2009 and March 11, 2009 via e-mail to project managers and administration personnel within the four Kansas City regional offices- Overland Park and Manhattan Kansas, and Riverside and Springfield, Missouri. Of the 67 employees the survey was sent to 31 completed it. The following are the survey questions and answers.

1. Which of these forms do you work with? (Check all that apply)		Response Percent	Response Count
<b>Consulting Company A Letter Agreements &amp; General Provisions</b>		<b>96.9%</b>	<b>31</b>
Standard Agreements drafted by Cities, Countries, States, or other Public Entities		71.9%	23
Contractor Pay Applications		50.0%	16
Certifications or Conformance Letters		40.6%	13
N/A, I don't work with any of these forms		3.1%	1
<input type="checkbox"/> Other (please specify)		3.1%	1
2. What is your involvement in using these forms? (Check all that apply)		Response Percent	Response Count
Draft the Forms		65.6%	21
<b>Draft &amp; Sign the Forms</b>		<b>78.1%</b>	<b>25</b>

Review of the Forms Drafted by Someone Else		56.3%	18
Review & Sign the Forms		59.4%	19
N/A, I don't work with any of these forms		3.1%	1

The first two questions are intended to identify to what extent those providing feedback to the survey are involved with project aspects that would likely entail the use of standard forms or their equivalents developed independently. Almost all those surveyed are familiar with Consulting Company A's standard agreement form, which is based on EJCDC standard agreement forms for owners and consultants providing professional services.

Over half of those surveyed work with agreements drafted by other entities that contract Consulting Company A's for professional services, and slightly less than half sign contractor related forms during the construction period.

3. Which of the following forms are you familiar with? (Check all that apply)		Response Percent	Response Count
AIA		41.4%	12
<b>EJCDC</b>		<b>44.8%</b>	<b>13</b>
DBIA		10.3%	3
Consensus Docs		3.4%	1
I'm not familiar with any of these forms		31.0%	9
4. Are you familiar with the industry disciplines that are represented by the following organizations?			
AIA	Yes	No	Response Count
EJCDC	70.4% (19)	29.6% (8)	27

DBIA	48.3% (14)	<b>51.7% (15)</b>	29
Consensus Docs	38.5% (10)	<b>61.5% (16)</b>	26
	8.7% (2)	<b>91.3% (21)</b>	23

Based on the survey response, less than half of those Consulting Company A employees who regularly deal with contract other construction industry forms are familiar with standard forms. AIA and EJCDC are the most commonly recognized, and ConsensusDOCS where only familiar to one of the 31 responders to the survey. It is possible that had the survey referred to AGC standard forms, instead of ConsensusDOCS a higher percentage would have reported familiarity with it. Nevertheless, the unfamiliarity of forms developed by the industry representing contractors is also clear from the case studies discussed in the following section. This is pertinent, because without a basic understanding that all of these organizations develop forms appropriate to certain relationships it is highly unlikely that the use of a more appropriate form will be suggested as an alternative.

5. Which of the following forms are you familiar with the standard methods for modifying?		Response Percent	Response Count
AIA		33.3%	10
EJCDC		23.3%	7
DBIA		6.7%	2
Consensus Docs		0.0%	0
These forms were not intended to be modified		13.3%	4
<b>I'm not familiar with any of these forms</b>		<b>40.0%</b>	<b>12</b>

Research conducted for this paper did not find any instances where standard methods for modifying forms were followed, except by the law office employed by Consulting Company A. However, it is apparent from the survey that a significant number of those working with forms are capable of identifying and modifying them as needed.

Questions 6 – 10 are intended to gauge how Consulting Company A's employees weigh contract language risk versus the potential revenue.

6. For a potential design-build project you submit a proposal using Consulting Company A's standard Letter Agreement and General Provisions. The potential client returns a different agreement typically used for sub-contractors, but the basic services, scope and fee section that you drafted are included as a section. The client informs you that their standard contract must be used. You would probably:		Response Percent	Response Count
Forward to Consulting Company A's legal counsel for review.		66.7%	20
Suggest modifications to unacceptable language.		16.7%	5
Sign the agreement since it includes the fair scope and fees you proposed.		3.3%	1
Attempt to convince the potential client that their agreement is inappropriate for a consulting services contract and press to use the Consulting Company A's agreement previously submitted, potentially at the risk of losing the project.		3.3%	1
N/A, I am not a project manager		10.0%	3

Most project managers surveyed would forward the contract to legal counsel for review, which is the safe alternative of the survey choices. Based on the interviews with Consulting Company A legal counsel, and reviews of past contracts researched for this paper, it is reasonable to expect that legal counsel would suggest modifications to the language in most cases. However, only one of the responders would have attempted to convince the Client that the contract provided does not appropriately represent the relationship of the parties, and suggest an alternative form such as Consulting Company A standard. This survey question and answers is consistent with the case studies researched, which both indicate that suggesting using alternative forms more appropriately reflecting



the relationships of the parties rarely considered. This is particularly true when the possibility of losing contracts exists. In short, within Consulting Company A potential profits generally outweigh the importance of appropriate contract language and forms.

7. Generally, you are less concerned with signing forms reflecting heightened levels of risk when our fees and scope for the project are relatively small?		Response Percent	Response Count
Agree		20.7%	6
Neutral		6.9%	2
<b>Disagree</b>		<b>65.5%</b>	<b>19</b>
N/A, I am not a project manager		6.9%	2

The answers to survey question 7 indicate that although suggesting alternative forms when those provided do appropriately reflect the relationship of the parties involved, most employees consider the language within the forms used to be important regardless of project or contract size. However, one-fifth of those surveyed consider the importance of project forms language less important when the scope and fee is relatively small.

8. How often do you adjust the insurance limits listed in agreements to reflect the contract amount?		Response Percent	Response Count
<b>Never</b>		<b>25.0%</b>	<b>7</b>
25% of contracts		17.9%	5
50% of contracts		21.4%	6

75% of contracts		7.1%	2
100% of contracts		7.1%	2
N/A, I am not a project manager		21.4%	6

Although the answers to survey question 8 were varied, they indicate that the insurance limits are adjusted to reflect the contract amount for less than one fourth of the agreements Consulting Company A enters into.

9. How often do you require a retainer from the client as part of contracts?		Response Percent	Response Count
Never		75.9%	22
25% of contracts		6.9%	2
50% of contracts		0.0%	0
75% of contracts		0.0%	0
100% of contracts		0.0%	0
N/A, I am not a project manager		17.2%	5
10. How often do you check the credit rating of potential clients?		Response Percent	Response Count
Never		72.4%	21
25% of contracts		10.3%	3
50% of contracts		0.0%	0

75% of contracts		0.0%	0
100% of contracts		0.0%	0
N/A, I am not a project manager		17.2%	5

The answers to questions 9 and 10 do not necessarily mean that Consulting Company A employees choose client relationships in a cavalier manner. Over 70% of work Consulting Company A engages in is with clients they have established on-going relationships with. Further, much of the new work Consulting Company A engages in is with clients such as municipalities, states, and private developers that are commonly known in the areas Consulting Company A operates, because consulting services, particularly civil engineering, tends to be a localized business. Question 9 could simply mean that clients have consistently proven to Consulting Company A that they are paying customers, and question 10 could mean the business practices of potential clients are well known in the areas Consulting Company A operates. However, considering Consulting Company A high growth rate over the past 15 years, and multiple entries into new markets it is highly unlikely that it knows its clients better than most other consulting firms. Therefore, these results could be compared to surveys conducted within other firms to gauge the riskiness of the company's business practices.

**Phone and e-mail Interview with Person B: Law Firm A Attorney contracted by Consulting Company A, March 31 and April 8, 2009.**

The following questions were e-mailed to Consulting Company A's attorney to serve as a basis for a phone conversation which occurred the following week: (Person B's responses are paraphrased in bold)

1. Some experts suggest using standard industry forms, such as AIA, EJCDC or ConsensusDOCS as an alternative when neither party accepts the others agreement forms. Do you agree that suggesting the use of standard forms is useful as a negotiating tool?

**Person B stated that he is a believer in the adversarial process. He focuses on obtaining the best terms available for his client, which may not necessarily be the most fair for both sides. Both sides pushing for their best interest will create a fair agreement. Whether the agreement is based on standard industry forms or begins as a blank sheet of paper is not as important as utilizing the adversarial process. Person B mentioned the uniqueness of projects requires significant effort be made to create forms properly representing the party's relationships.**

2. Some of your review comments suggested adapting Consulting Company A's standard agreement language into the other party's agreement to replace unacceptable language. Since Consulting Company A's agreement is based on EJCDC documents, would you feel comfortable suggested the language be borrowed from EJCDC forms instead of Consulting Company A's if this makes the client more comfortable with the change?

**See answer to Question 3.**

3. Do you agree potential clients would generally be more receptive to the suggestion of using industry standard forms than using Consulting Company A's standard agreements as an alternative to their agreements that we find unacceptable?

**Depending on the form, Person B expects that some clients would be more comfortable using standard forms from organizations they consider beneficial, such as AIA which he thinks generally favors owners. EJCDC forms may not be viewed as favorably by clients. Also, since courts have ruled on cases involving these standard forms users can have a better idea of how the language would be interpreted by judge. But, despite these benefits clients may associate with standard forms, Smith would generally not recommend their use. He would focus on using Consulting Company A's standard language, which the company has spent considerable**

**efforts developing. This allows for familiarity with the language by Consulting Company A's employees, which is critical in Person B's opinion. Using different contract forms creates multiple problems. Another benefit of using Consulting Company A's standard forms is that it will not require as much input from legal counsel.**

4. Potential clients, such as cities and contractors on design-build projects, often request Consulting Company A sign their standard agreements, which are based on AGC ConsensusDOCS. These documents are designed for owner-contractor, or contractor-subcontractor relationships, and therefore contain a considerable amount of language that doesn't make sense for a professional services contract. In these cases it can be very difficult to modify all of the language to reflect an owner-consultant relationship. Ideally, the client would agree to use our standard agreement form or an EJCDC form, but may not be willing to do so. In this case, would you be comfortable accepting the use of a DBI form designed for a contractor-consultant relationship as an alternative? This question was expanded in the phone interview to include using any standard form intended for a owner-design professional relationship.

**If an impasse is reached and the client won't use Consulting Company A's standard form language Person B considers it more of a "business decision" than a legal decision to use a different form than an attorney's decision. Person B gave an example of waiving consequential damages, which could have greater implications on a casino project than a school project. He also cited considering the past relationship with the client as a "business decision."**

**However, from Person B's perspective the use of any standard form properly reflecting the party's relationship is much more favorable than using a form provided by a client as described in Question 4. The form would need to be modified correctly, which would require an attorney's input. Ideally, OA should have a standard form for design-build projects which would be used in this circumstance. Person B noted that he has had to modify owner-contractor based contracts for use in owner-consultant relationships in the past.**

5. Do you agree that using industry standard forms is particularly beneficial for small to mid-size firms that may not be able to justify extensive use of legal counsel in drafting and reviewing agreements, and other common forms such as certifications?

**Person B agrees that standard forms may be particularly beneficial for small companies or projects, but review by legal counsel is still recommended.**

6. If you identified that a form was based on industry standard forms, but has been modified, would you request the other party document the modifications with strike-through or underlines as proscribed by the producer of the form?

**Person B would request the changes be documented before reviewing, and cannot think of a legitimate reason anyone would refuse the request.**

7. How important do you consider an understanding of standard forms and the methods for modifying them to be for project managers?

**After clarifying that project managers in this case means those who make business decisions, Person B considers an understanding of standard forms and the methods for modifying them to be fairly important. He recommends that project managers not be allowed to sign contracts without certain provisions, and an attorney and a few persons with a good understanding of standard forms are very important for any consulting company.**

## **Consulting Company A Case Studies**

The primary purpose of this paper is to determine to what extent industry standard forms are used by Consulting Company A when reviewing and negotiating the language of forms presented by Client's. A secondary purpose is to gauge how important the company considers agreement and other commonly used forms not developed internally for relatively small project scope and contract amounts. The legal correctness and judgments of Consulting Company A's employees is not examined in depth with this paper, other than to note the understanding and use of standardized forms. The cases all took place during 2008, and are included in full in Appendix C.

In none of the cases researched did Consulting Company A's employees suggest to their clients the use of standard industry form language or forms as an alternative to the language presented. Neither was language of standards forms referenced as an example of commonly acceptable language in negotiations. Further some of the agreement researched were based on standard industry forms, but did not use the standardized methods for modifications recommended by the organizations which produced the forms. In several of the cases researched Consulting Company A's project managers or legal counsel recognized that the forms were based on AGC or AIA documents, and that the modifications were not properly documented. However, there is no indication that the client providing the form to Consulting Company A's was asked to use the standard methods for modifications, or even to mark the modifications using any method at all.

In sum, the cases researched indicate that a minority of Consulting Company A's employees are familiar with standard industry forms and few if any employees promote the use of the standard methods for modifying forms.

## Case Study 1: City A Agreement

The City of City A in Arizona produced an agreement form to contract Consulting Company A to conduct a traffic study. The agreement used the City's standard contract language, which is not clearly based on any of the three standard forms studied in this paper. The Consulting Company A's project manager forwarded the agreement to legal counsel for review where it was determined to have several clauses that were either uninsurable or present levels of risk too great to accept for the contract amount. Although the contract language was able to be negotiated in this case it was determined that several previous agreements between The City of City A and Consulting Company A were executed based on the language determined to be unacceptable. According to the Consulting Company A legal counsel and insurance company the previous contracts administered by a different project manager were not reviewed at a corporate level and apparently were determined at an office level to be acceptable. The following are the notes from Insurance Company A (Consulting Company A's insurance company) on sections of the agreement form prior to negotiations that were determined to represent heightened levels of risk:

- Article 5, gives ownership of your work to the City. No provision is made for the City to hold Consulting Company A harmless for any reuse. Not sure if this is a big concern but given the fact this is an Analysis and Study contract the probability for risk on this issue is probably pretty low.
- Article 9 is a warranty statement which also includes a requirement to perform to the "highest" standard of care. Warranties are excluded from professional liability. If a breach of warranty claim is made it could become a self insured exposure to Consulting Company A. Also, requiring services be provided to the "highest" standard of care could present a problem. If Consulting Company A meets the industry standard of care but fails to meet, in the City's opinion, the "highest" standard a claim could happen. This also could present an uninsured exposure since professional liability is related to the industry standard not some contractually assumed "highest" standard. Can this Article be deleted?
- Article 10 is the indemnification clause. It requires Consulting Company A to "defend" the city, which professional liability will not defend other parties. Can "defend" be deleted? It is tied to negligent acts which is good but it is very broad in the type of claims Consulting Company A could be responsible for, "any and all losses...". All insurance policies have exclusions and limitations so its impossible to say "any and all" claims are covered.



- Article 11 is the insurance section, which happens to be 3.5 pages long:
  1. 11.e requires the insurance to be "primary". This is okay for all policies except the Umbrella. This is an "excess" policy and not a primary policy. This is also addressed in section 11.j.2. Interestingly though is the contract does not specify a limit for the umbrella policy. Section 11.2 lists the required Insurance Coverages
  2. 11.j.4 requires a change to the certificate of insurance on the standard cancellation language. Cincinnati and CNA Insurance will allow this to be done. (Other insurance companies do not allow this which is an issue to consider when we present other insurance options.) I see where we have done a couple of Insurance Certificates to City A in the past on specific projects. The one for the City A Sports Complex did not include this.
  3. 11.2.c requires an "unimpaired" limit of \$2mm on the professional liability. If Consulting Company A's limits ever go below \$2mm due to claims or reserves, you would be obligated to increase your limit to an "unimpaired" \$2mm.
  4. 11.2.d requires Employers Liability limits greater than what Consulting Company A carries. However, Consulting Company A's umbrella limits can be used to satisfy this requirement and should be acceptable to the City.
  5. 11.3 requires 30 days advance notice of cancellation, which is fine, but they also want 30 days advance notice of a "material change" which won't happen. Insurance companies do not send notice to your clients of changes to your policies. Can "materially changed" be deleted?
- Article 14.11 is a prevailing parties clause which states if legal action is brought by one party against the other, the losing party pays to winning party's legal expenses. Professional liability insurance companies look at this as a contractually assumed obligation that you would not otherwise have and therefore it is excluded from coverage. It could work in Consulting Company A's advantage if Consulting Company A wins but if Consulting Company A loses it could be paying the City's legal bills.
- Nothing is addressed in the contract for dispute resolution. Would they be willing to use mediation?

The Article 10 indemnification section of the City A agreement form appears to be based on the EJCDC standard form of agreement between owner and engineer for professional services with the major changes being the addition of the language deemed harmful by Insurance Company A. This appears to be an ideal opportunity to suggest using the standard language produced by EJCDC from which the document was based on. By suggested the standard language be used, or using EJCDC's standard method for deleting the unacceptable additions, the client might be more likely to consider the request. The use of standardized language is perhaps most useful for smaller companies or at least for smaller projects, because the contract amounts likely do not justify extensive negotiations involving legal counsel. Adopting standardized language appropriate for the relationship of the parties as or part of the project agreement forms should be viewed as much safer than suggestions of project managers using

their personal judgment. Yet it is not done in this or any other of the cases.

## Case Study 2: Company B AGC.

Company B, an equipment company, produced an agreement form for testing services during construction of a project designed by Consulting Company A. Upon receiving the contract, the Consulting Company A project manager recognized it was based on AGC (Associated General Contractors) standard forms, and forwarded it to review by corporate legal counsel. Legal counsel forwarded the document to its attorney for review, who provided the following comments.

### GENERAL COMMENTS

1. The document I received consisted of a 17 page AGC standard form agreement. The agreement did not show redline changes, so I can not tell what modifications Company B has made to the standard agreement.
2. There is no waiver of delay damages or any limitation on Consulting Company A's liability. There is a waiver of consequential damages (5.3) but it only applies if the agreement between Boyd Jones and the Owner has a waiver of consequential damages. **Consulting Company A should review that agreement to determine if there is a waiver of consequential damages. If not, Consulting Company A may want to revise the language so the waiver of consequential damages applies even if there is no such waiver in the Company B agreement with the Owner.**

Paragraph 3.2 states Consulting Company A's services will be performed in accordance with the schedule and 3.2.16 and article 5 requires Consulting Company A to complete its work so that Company B can complete its work in accordance with the schedule. It also provides that Consulting Company A will indemnify Company B from any delay damages. The potential lack of a waiver of consequential damages, and no waiver of delay damages, no cap on liability, and potential liability for actual delay damages of course, increases Consulting Company A's possible risks, depending upon the nature and amount of the claim. **Consulting Company A may want to add waiver of consequential damages and/or a no damage for delay clause and/or language that makes the completion dates goals and not deadlines and/or a cap on Consulting Company A's liability. Consulting Company A may want to commit to a certain number of days to complete its work so that if it meets that deadline, it is not responsible even if Company B does not meet its schedule requirements.**
3. The agreement does not specifically allow Consulting Company A to charge interest or suspend work for nonpayment, does not require Company B to give notice of disputed invoices and allows Company B to withholding payment based upon a claim or offset against Consulting Company A (6.3.5) even if the claim relates to another project (6.4). **Consulting Company A may want to incorporate language similar to 3.2 and 3.3 from its General Provisions.**
4. The agreement provides that Company B will receive ownership of the property rights except copyrights (10.1). **Consulting Company A may want to retain ownership of its work and may want to add language where the Owner indemnifies OA from any claim arising out of reuse similar to 7.1 of its General Provisions. Also, Consulting Company A may want to add language similar to 7.2 with regard to electronic files.**

### COMMENTS REGARDING SPECIFIC PARAGRAPHS

- 2.2.1 Defines Consulting Company A's scope of work as services "required by Company B Construction Company for the Project." **This description is somewhat vague and does not specifically identify Consulting Company A's scope. I suggest revising as follows:**

“... The Services ~~consist of includes~~ Basic Services ...”

- 2.3 Provides that this is the entire agreement. **If Consulting Company A wants to revise the agreement, the revisions should be made directly to this document or in an exhibit specifically incorporated into the document with language that if there is a conflict, the exhibit controls.**
- 3.1 Incorporates the prime contract. **I did not receive a copy of the agreement between Company B and the Owner and therefore, I did not review it. Consulting Company A should review that agreement before signing this agreement so it knows what obligations it is agreeing to.**
- 3.2 Defines Basic Services. I suggest the following revision:

“...in subparagraph 3.2.19 and shall include normal architectural, structural, mechanical electrical and site design related to the Basic Services.”

- 3.2.11 Provides that “Consulting Company A shall endeavor to guard Company B Construction Company against defects or deficiencies in the construction. **Consulting Company A may want to delete this language. The language which follows that requires Consulting Company A to notify Company B if Consulting Company A becomes aware of defects should be sufficient protection to Company B and Consulting Company A may not want to take on any more responsibility than that.**
- 3.2.16 Requires Consulting Company A to complete its work so as not to delay Company B. Consulting Company A **may want to delete. If Consulting Company A has already committed to complete within a certain time period, that should be sufficient, either Consulting Company A meets the deadline or it does not, Consulting Company A may not want to commit to some vague language regarding delaying Boyd.**
- 3.2.17 States that Consulting Company A will help Company B conduct inspections. Consulting Company A **may want to substitute the term “observations” for “inspections”.**
- 3.5 Requires Consulting Company A to obtain written approval before subcontracting any of the work. **If Consulting Company A intends to subcontract, it may want to obtain permission before it signs the agreement so it knows whether or not it will be allowed to subcontract with a certain entity.**
- 4.1 Provides that Consulting Company A may rely on information from Owner but only to the extent that Company B can rely upon it. Consulting Company A **may want to review prime contract to see if Company B can rely on information from Owner or Consulting Company A may want to delete the language “to the same extent as Company B Construction Company.” so that Consulting Company A can rely on information from Owner.**
- 5 Requires Consulting Company A to complete its work so that Company B can complete its work in accordance with the schedule. Consulting Company A **may want to add language that makes the completion dates goals and not deadlines and/or a cap on Consulting Company A’s liability. Consulting Company A may want to commit to a certain number of days to complete its work so that if it meets that deadline, it is not responsible even if Company B does not meet its schedule.**
- 5.1 Provides that Consulting Company A will indemnify Boyd from delay damages. Consulting Company A **may not want to commit to delay damages. Consulting Company A may want to add language waiving delay damages. Consulting Company A may want to review prime contract to see what type of delay damages Company B is liable for and to see if there are any liquidated damage provisions.**
- 5.2 Provides that if Consulting Company A is delayed by Company B or Owner, Consulting Company A’s time will be extended or Company B shall authorize overtime. I suggest the following revision:
- “... shall authorize Consulting Company A to work overtime to make up for such lost time and Company B shall compensate Consulting Company A for the increase cost of the overtime.
- 5.3.1 Provides a waiver of consequential damages but only if the prime contract contains such a waiver. Consulting Company A **may want to review the prime contract to see if there is a waiver of consequential damages or Consulting Company A may want to revise the language so there is a waiver of consequential damages in this agreement even if there is no such waiver in the prime agreement.**

Also provides that the waiver applies to termination by Company B or the Owner. Consulting Company A **may want to delete this specific reference because it can create a question as to whether or not the waiver applies to other provisions in the agreement beside the termination by Company B or Owner.** Consulting Company A **could clarify that the waiver applies to all instances by adding language at the beginning of the paragraph:**

“Notwithstanding any provision in this Agreement to the contrary”

- 6.3.1 Provides that Consulting Company A will be paid within 7 days after Company B receives payment from Owner. Consulting Company A **may not want its payment tied to payment from Owner.**
- 6.3.5 Provides that Company B can withhold payments from Consulting Company A if Consulting Company A is in default. Consulting Company A **may want to revise so that Company B cannot withhold payment unless it is finally determined through legal process that Consulting Company A is in default.**
- 7.1.1 Provides that Consulting Company A will indemnify Company B. **I suggest the following revision:**
- “... from and against claims, actions, proceedings, liabilities, losses, direct damages, costs and expenses, including legal fees, relating to bodily injury or property damage that might arise from the performance ...”
- 7.1.2 **I suggest the same revision as in 7.1.1.** Some of the language is different between 7.1.1 and 7.1.2 and I suggest it be revised so it is consistent:
- “ that may arise from the performance of - ... which Consulting Company A, its officers, agents and employees may sustain by reason of any negligent actor or omission by Company B Construction Company, its officers, agents, employees or Subcontractors arising out of Company B Construction Company’s Work, to the extent of the negligence attributed to such acts or omissions by Company B Construction Company, its officers, agents, employees or subcontractors, or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.”
- 7.2 Deals with insurance, I did not review.
- 8.1 Allows either party to terminate upon 7 days notice. Consulting Company A **may want to try and extend the notice period and add an opportunity to cure during that period and/or may want to add language that allows the party to either cure in 7 days or if cure cannot occur in 7 days, the party will begin working toward cure within 7 days and continue working toward cure until cure is completed.**
- 8.3 Provides that if Consulting Company A is terminated, it shall be entitled to compensation to the extent the Owner pays Company B. Consulting Company A **may not want its payment tied to payment from Owner.**
- 10.1 Provides that Company B shall receive ownership of property rights, except for copyrights. Consulting Company A **may want to retain ownership.**
- 10.1.2 Provides that neither Owner nor Company B may use works for other projects without authorization of Consulting Company A who shall not unreasonably withhold authorization. Consulting Company A **may want to add language that it is not liable for Owner’s or Company B’s unauthorized use and that Owner and Company B will indemnify Consulting Company A from any claims relating to unauthorized use.**
- 10.2 Provides that neither party will assign without consent.
- 10.3 Provides that the governing law is the state in which the project is located.
- 11 Incorporates Exhibit A, the agreement between Owner and Company B and Exhibit B, Owner’s Program, Company B schedule and estimates and any other relevant information. **I was not provided a copy of the Exhibits.** Consulting Company A **should obtain a copy of the Exhibits and review them before signing this agreement so Consulting Company A knows what it is committing to.**

Legal Counsel also noted in the e-mail returned with the comments to be careful when reviewing future agreement forms received from Company B, since the modifications were redlined. The reviewer used AIA standard methods to document his suggested changes. None of the reviewing parties suggest in their correspondence that using ConsensusDOCS or other AGC documents for a consulting agreement is inappropriate. In fact, the project manager requested the review be done primarily for future work that is expected, indicating the form will become the basis of agreements for an ongoing relationship.

Suggestions were made to modify the contract to read similarly to Consulting Company A's standard agreement forms. This is similar to suggesting EJCDC language, but is not likely to be viewed the same by the client.

### Case Study 3: City B Agreement

The City of City B provided a consulting services agreement form for Consulting Company A review. The contract was determined to be based on contracts the City normally has with contractors. Consulting Company A did not suggest using its company form, which is based on EJCDC documents, or using industry standard forms more appropriate for client- consultant agreements. Instead, legal counsel suggested the following modifications to the agreement language.

The contract calls the design professional a "contractor". This should be changed to "design professional" to try and avoid any future misunderstanding as to what your role was on the project. The following are comments from Consulting Company A's insurance carrier:

- The indemnity in II.C requires Consulting Company A to "defend" the city. Can this be deleted to avoid Consulting Company A of possibly having to provide an up-front defense for the city that may not be insurable.
  - The clause also requires Consulting Company A to be responsible for claims caused in whole or in part by the negligence of Consulting Company A. This could require Consulting Company A to pay for 100% of the damages even though Consulting Company A was only partially at fault. Can this be clarified or changed so that Consulting Company A is only responsible for the portion of damages caused by your own negligence.
  - Section II.F requires "comprehensive" general liability insurance. This is an incorrect, out of date term. The correct term is "commercial".
    - Also in this section, Consulting Company A is required to inform the city of any cancellation or change in your insurance. The insurance company would provide notice of cancellation but Consulting Company A would still have to notify the city of changes. This is a pretty broad requirement that may be difficult for Consulting Company A to meet since your MN office may not know when changes are made.
    - Section II.G gives ownership of your work to the city but there are not protections given to Consulting Company A from any future reuse of the work. Would the city be willing to indemnify Consulting Company A from any claims arising from the reuse where Consulting Company A is not involved.
    - Section IV.B is a pretty broad requirement to comply with the ADA. As I understand it this is more civil legislation than a building code so the interpretation of the ADA could be left up to the courts. Would Consulting Company A 's services on this project create any potential disability-type claims? If so this section should be revised.
    - Section IV.D requires compliance with all applicable codes. Can the word "all" be deleted? Also, applicable codes in effect at what time, the beginning or the end of the project?
    - Mediation is used to resolve disputes which is good.

#### Case Study 4: Engineer of Record

The engineer of record case study of a project in City C Arizona highlights that although some Consulting Company A's employees are experienced legal aspects of construction industry forms, suggesting the use of standard document language is not considered. The City provided their standard form to be signed by the engineer of record with typical language found in many cities, some of which is not desirable by the engineer. (See appendix for City's certification form)

The following e-mail correspondence describes the thorough understanding and company accepted language regarding engineer of record certifications. EJCDC produces form C-625 Certificate of Substantial Completion, formerly named 1910-8-D. This document is commonly accepted by the construction industry, and is not only available through EJCDC, but is promoted on AGC websites also. The case study shows that although the acceptable language for certifications is understood the use of standard forms is not important to Consulting Company A.

Person A, "certifications" are always a concern since they could be construed to be a warranty or a guarantee, which are specifically excluded from coverage under the professional liability insurance. The document requires "near continuous field inspections" and as I understand it Consulting Company A will not be doing this. If the form can be modified it may be helpful to define what is meant by Certify. Here is an example: *As used herein, the word certify shall mean an expression of the Consultant's professional opinion to the best of its information, knowledge and belief, and does not constitute a warranty or guarantee by the Consultant.*

I hope this helps. Please let me know if you have any questions.

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Please review and comment on the attached document from X. It will also be helpful to read X's comments in the email below.

X requests your comments soon as the client is looking for our scope and fees by the end of the week. We would like comments prior to that.



Thanks for your attention to the matter.

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Please have the attached reviewed for exposure to liability. The Phoenix office is involved with design of off site sanitary sewer for the X project. This sewer project is approximately one mile in length. The Developer has hired a Construction Management Firm, X, Inc. who is looking to contract with Consulting Company A to satisfy the City of City C requirements that a Registered Professional Engineer seal and sign a document indicating that all work was done in accordance with the engineering design. During construction the CM is on site monitoring the work as well as the City of City C Civil Inspector and they are responsible for the Quality Assurance while the Engineer of Record (EOR) is responsible for Quality Control which includes compiling, reviewing and commenting on project documentation including field reports, materials testing reports and verification of As-built drawings as well as periodic site visits. Our surveyors are staking the project and will be available to verify line and grade while on site. Other than that Consulting Company A's actual time on site will be minimal with elevation checks made at hold points of construction and the certification will be signed based on evaluation of reports indicating verification of installed systems are correct according to the design. This information is provided to the EOR by CM, City personnel and Material testing laboratory.

The "Final Certification Format" can be modified if modifications are approved by the City of City C.

This is somewhat of a hot button as the project is ready to start and the CM is looking for our scope and fees yet this week. Let me know if you need anything else.

## Case Study 5: Indemnification/Sub-Contractor Agreement

A Consulting Company A project manager forwarded a contract from Company G Construction Company for consulting services on a design build project. The project manager asked for the indemnification section to be reviewed. Consulting Company A legal counsel forwarded the document for review by its insurer who correctly identified the form to be Company G's standard agreement with sub-contractors. The indemnification section is provided below, which clearly is inappropriate for engineering consultants as it would require the sub-contractor, Consulting Company A, to indemnify itself as the engineer.

4. Indemnification. The Subcontractor shall indemnify, defend and hold the Contractor, the Prime Contractor, Owner, Architect/Engineer, their agents, consultants and employees harmless from and against all claims, losses, costs and damages, including but not limited to attorneys' fees, pertaining or allegedly pertaining to the performance of the Subcontract and involving personal injury, sickness, disease, death or damage to tangible property (other than the Subcontract Work itself), including loss of use of property resulting there from, economic loss, or other claims or damages, to the extent caused in whole or in part by the negligent acts or omissions or other fault of the Subcontractor, or any of the Subcontractor's subcontractors, suppliers, manufacturers, or other persons or entities for whose acts the Subcontractor may be liable. This indemnification agreement is binding on the Subcontractor, to the fullest extent permitted by law, regardless of whether any or all of the persons and entities indemnified hereunder are responsible in part for the claims, damages, losses or expenses for which the Subcontractor is obligated to provide indemnification. It is specifically agreed that the indemnification obligations of the Subcontractor include but are not limited to any fines, penalties, or damages assessed to Contractor by the Occupational Safety and Health Administration, or any similar state or local agency relating to or arising from the Subcontractor's Work. This indemnification provision does not negate, abridge or reduce any other rights or obligations of the persons and entities described herein with respect to indemnity.

Below is the review provided via e-mail to the project manager from Consulting Company A legal counsel and the insurance reviewer:

X, looking at the indemnity from a General Liability perspective its not too bad. However, if its a professional liability issue then this is a bad clause.

- It requires Consulting Company A to defend the contractor, and others, which professional liability wouldn't do.
- It requires Consulting Company A to indemnify "to the extent caused in whole or in part..." which could cause Consulting Company A to be responsible to pay for damages caused by the contractor, or others, as

long as Consulting Company A was partially at fault. Professional liability would only pay for Consulting Company A 's portion and not that caused by the contractor or the owner.

- Fines and penalties are included. These would be excluded from both professional liability and general liability. (General Liability is for bodily injury and property damage).

It looks like this is a standard agreement used by Company G for subcontractors, whereby the general liability insurance would apply. They don't even have a clause requiring professional liability insurance.

Please let me know if you have any questions.

---

Hi X,

Please see the indemnification on page 2 and provide comments. It looks quite onerous to me.

Thanks,

The entire agreement is included in the appendix, which has more language inappropriate for professional services such as wearing hard hats. Suggesting the use of Consulting Company A's standard agreement or an EJCDC document more appropriate for consulting services seems obvious, but there is no indication this was done.

## Case Study 6: Company C Agreement

An Consulting Company A project manager forwarded a contract from Company C Excavating, and requested review by both its insurance agent and attorney. The project consisted of containment of pollutants through installation of barrier material and monitoring wells. Consulting Company A would serve as a sub-consultant and sub-contractor, since Consulting Company A would be purchasing barrier material and hiring a sub-contractor to handle the installation.

In this case the contractor-sub-contractor agreement reflected the appropriate relationship between Consulting Company A and Company C Excavating. However, Consulting Company A found several articles for which the language would result in heightened levels of risk it should not have to incur. Although suggested modifications to the inappropriate language were provided by Consulting Company A's legal counsel, the use of standardized forms, such as ConsensusDOCS, were not recommended. Below are a sample of the comments from the Consulting Company A's attorney representing that detailed analysis of the agreement was made, and useful comments provide.

### GENERAL COMMENTS

1. I received 3 documents. A 16 page Subcontract Agreement, an 11 page Agreement between Owner and Contractor – Stipulated Sum and a 45 page general conditions. The subcontract references Special Provisions, but I did not receive any Special Provisions other than what is provided in article 15. **I assume there are no other Special Provisions.**
2. The insurance requirements are referenced in Article 12 of the Subcontract. **I did not review. I assume Consulting Company A will discuss with its insurance agent to make sure it can obtain the required insurance for the required durations.**
3. The Subcontract incorporates the Agreement between Owner and Contractor and the General Conditions. **Consulting Company A may not want to agree to this provision. Consulting Company A may not want to be bound to the terms of an agreement it did not negotiate. Just because Company C was willing to accept certain risks in the Owner agreement does not mean that Consulting Company A is willing to accept those risks. However, it is likely that Larkin will not subcontract with Consulting Company A if Consulting Company A does not accept this provision since Company C's agreement with the Owner requires that Company C include this type of provision in its subcontract. As a result, Consulting Company A will probably need to make a business decision as to whether to accept these risks, or walk away from the subcontract.**
4. There is no waiver of delay damages, no waiver of consequential damages and no cap/limitation on Consulting Company A's liability. **In fact, paragraph 6.7 of the Subcontract provides that if the Contract provides for liquidated damages, Company C can assert Liquidate damages against Consulting Company A for Consulting Company A's share of delay and Larkin can also assert actual damages that Company C suffers. Article 3 of the Subcontract requires Consulting Company A to complete its work so that the entire project can be completed on time. 3.2 of the Owner's Agreement requires substantial completion of the Project by August 1, 2008. The lack of a waiver of consequential damages, no waiver of delay damages, no cap on liability, the potential for liquidated damages and the potential for liability for actual delay**

damages of course, increases Consulting Company A's possible risks, depending upon the nature and amount of the claim. Consulting Company A may want to (1) add language that makes any completion dates goals and/or (2) add a no damage for delay clause and/or (3) add a waiver of consequential damages and/or a limitation of liability provision.

5. The Subcontract paragraphs 5.2.5 and 5.2.6 provide that **Company C** does not have to pay **Consulting Company A** unless **Company C** is paid by the Owner. Consulting Company A may want to delete the provision and may want to incorporate language similar to 3.2 and 3.3 from its General Provisions regarding payment, interest on past due payments and allowing Consulting Company A to suspend services for nonpayment.
6. The agreement does not specifically address ownership of **Consulting Company A** documents or electronic documents. If Consulting Company A will be supplying documents and/or electronic documents, it may want to add language similar to 7.1 and 7.2 of its General Provisions with regard to ownership and electronic files.

#### COMMENTS REGARDING SPECIFIC PARAGRAPHS

#### **SUBCONTRACT AGREEMENT**

Article 1 References "Ink Commercial Contractors, LLC. I believe this is a typo. Provides that **Consulting Company A** shall replace employees of Subcontractors, Suppliers or other persons upon written request of Owner.

- 2.3 Provides that if there is a conflict between the Contract Documents and the Subcontract, the Contract Documents shall govern. Consulting Company A may want to change so the Subcontract governs. Otherwise, any Consulting Company A revisions to the Subcontract will not have any effect unless they do not conflict with the Contract Documents and as a result, most revisions would have to be made to the Contract Documents which would be difficult since the Owner would have to agree to any such revisions. However, it is likely that Company C will not subcontract with Consulting Company A if Consulting Company A does not accept this provision since Company C's agreement with the Owner requires that Company C have subcontractors be bound to Company C as Company C is bound to the Owner. As a result, Consulting Company A will probably need to make a business decision as to whether to accept these risks, or walk away from the subcontract.

- 3 Provides that time is of the essence and that **Consulting Company A** must complete its work so that the entire project may be completed on time. Also provides that the schedule can be adjusted and that **Consulting Company A** will be bound by any such adjustment. Also provides that **Company C** can decide the time, order and priority of **Consulting Company A's** work and requires **Consulting Company A** to begin work within 2 days of notice. Consulting Company A may want to (1) add language that makes any completion dates goals and/or (2) add a no damage for delay clause and/or (3) add a waiver of consequential damages and/or a limitation of liability provision. At a minimum, Consulting Company A may just want to commit that it will complete its work within a certain time period and not agree that it will complete its work so that the project will be completed on time. Consulting Company A may not want to allow Company C to adjust the schedule and have Consulting Company A be bound by the adjustment. This would allow Larkin to unilaterally shorten Consulting Company A's time of completion. Consulting Company A may not want to allow Company C to dictate the time, order and priority of Consulting Company A's work, Consulting Company A may want to retain control over those functions. Finally, Consulting Company A may want more than 2 days notice to begin work.

- 5.2.2 Provides that rate of retainage will be equal to retainage by Owner provided **Consulting Company A** furnishes a bond but if **Consulting Company A** does not furnish a bond the retainer will be 10%.

- 5.2.5 Provides that **Company C** will pay **Consulting Company A** within 7 days after **Company C** is paid by Owner. Consulting Company A may not want its payment contingent on Company C receiving payment from Owner.

- 5.2.6 Provides that receipt of payment from Owner is a condition precedent to Larkin's obligation to pay **Consulting Company A**. Consulting Company A may want to delete, it may not want its payment contingent on Company C receiving payment from Owner.

- 5.3.3 Provides that **Consulting Company A** will receive final payment upon **Company C** receiving a release from the owner related to **Consulting Company A's** work and within 7 days of Larkin receiving payment.

**Consulting Company A may not want its payment contingent on Company C receiving a release and payment from Owner.**

- 6.3 Requires **Consulting Company A** to give **Company C** notice of claim, including claim for change order work, within 5 days. **Consulting Company A may want a longer period of time. 8.3.2 of General Conditions of Owners Contract allows 10 days. 4.4 of the Owner Contract limits subcontractor markup to 5% for profit and 8% for overhead for change orders.**
- 8.1 Provides that **Consulting Company A** binds itself unto **Company C** in the same manner as Larkin is bound to Owner. **Consulting Company A may not want to agree to this provision. Consulting Company A may not want to be bound to the terms of an agreement it did not negotiate. Just because Company C was willing to accept certain risks in the Owner agreement does not mean that Consulting Company A is willing to accept those risks.**
- 9.2 Requires **Consulting Company A** to complete its work in strict accordance with the contract documents and in the most sound and workmanlike manner and that its workmanship will be the best of several kinds. **Consulting Company A may want to limit its standard to that of similar subcontractors performing similar subcontract work in a similar locale.**
- 9.5 Requires **Consulting Company A** to indemnify **Company C** from any claims arising out of **Consulting Company A's** use of **Company C's** equipment. **This would require Consulting Company A to indemnify Company C 100% even if Company C was 99% responsible and Consulting Company A only 1% responsible. Consulting Company A may want to revise so that its indemnity obligation is limited to its comparative fault. Arguably, even if Consulting Company A revises the Subcontract, it will still be required to indemnify Company C 100% even if Company C was 99% responsible and Consulting Company A only 1% responsible because 4.17 of the General Conditions to the Owners Contract contains such a provision. As a result, arguably, if Consulting Company A wants to revise, it would have to revise both the Subcontract and the Owner's Contract or it would have to provide that if there is a conflict between the Subcontract and the Owner's Contract the Subcontract controls.**

The comments illustrate that the use of standard forms or their language was not considered even though the attorney had clearly shown in a previous case study a familiarity with them. Note several sections recognize the issues with the contract to be potential deal-breakers. It is possible Company C would be more receptive to the suggestion of using standard forms or language from AGC developed or endorsed documents. But, even with the recognition that requiring modifications may result in losing the contract, the suggestion of using standard language approved by the industry representing the contractor is not considered. Instead, the project manager is left to make a "business decision" in the best interest of Consulting Company A whether to accept portions of the contract as they are.

## Case Study 7: Company D

An Consulting Company A project manager forwarded a surveying contract from Company D requesting review. Many of the sections of the contract received from Company D were determined to have language that was inappropriately risky for Consulting Company A by its attorney. General comments and suggestions for modifications were provided, and for Section 36 of the contract included below specific language for replacing the section were provided by the attorney. The use of standard forms that would be acceptable to Consulting Company A or referenced language from standard forms to replace Section 36 was not mentioned. The complete list of the attorney's comments is provided in the appendix.

- 36 Requires Consulting Company A to indemnify Company D. Consulting Company A **may want indemnity to be mutual so Company D indemnifies** Consulting Company A **also**. Consulting Company A **may want to revise language as follows:**

“... from and against all claims, liability, liens, loss, judgments, ~~penalties, suits and~~ direct damage (collectively, “Claims”) ~~whether for breach of the Subcontract, for~~ personal injury, death or damage to property arising out of the Subcontract or Seller’s negligence and including without limitation, any costs, expenses and attorney fees arising out of or caused by such Claims but only to the extent Seller is responsible on a comparative basis of fault, whether or not resulting from or alleged to result from the negligence, but excluding sole negligence, of Buyer.”

## Case Study 8: Company E Contract

An Consulting Company A project manager forwarded a contract for geotechnical services from Company E to legal counsel for review. The contract included significant language indicating it was based on Company E's standard owner-contractor agreement. As with other case studies presented in this paper, and all researched from Consulting Company A suggestions were made to change the wording, but the use of industry standard forms and language to be used in substitute apparently was not considered. Below are samplings of the comments from Consulting Company A's insurer indicating it was clearly understood the agreement was not based on standard owner-consultant forms, but rather was developed for contractor relationships.

- 572.22 requires Consulting Company A to purchase permits as may be required by any authority that may have jurisdiction "over the jobsite". It should be for Consulting Company A 's work and not for anything and everything related to the "jobsite".
- - (6) requires contractor's pollution liability. Consulting Company A has pollution coverage as part of the professional liability policy but not a stand alone pollution policy. Please let me know if you need this separate coverage.
  - (8) has to do with transportation of property. Consulting Company A does not have this coverage. Please let me know if this is needed.
  - 572.45.1.14 requires "strict compliance with the contract documents". This could present a problem since even the slightest deviation could present a breach of contract claim even though the services may still be within the acceptable industry standard. Can the word "strict" be deleted?
  - 572.45.1.16 requires Consulting Company A to be "solely responsible for safety on the project". This should be deleted as Consulting Company A should only be responsible for their employees and the general contractor should be responsible for overall jobsite safety. This is also addressed in section 572.56.



## Case Study 9: Company F General Conditions

In review of the general conditions of a professional services agreement Consulting Company A's attorney recommended multiple modifications. This is one of two cases in which the attorney recommended incorporating language similar to several sections from its General Provisions, which are based on EJCDC standard forms (see below attorney's comments to Sections 9, 10, 6.2, 19.2, 27).

5. There is no waiver of delay damages. There is a waiver of consequential damages in 29.2 but the waiver does not apply to indemnification claims or if the agreement is terminated for default. There is a limitation on Consulting Company A's liability in 29.3 to twice the total value of the work but it does not apply to indemnification, termination for default or breach of warranty.  
Paragraph 9 states that time is of the essence, that Consulting Company A will comply with start and completion dates, that the Company can order Consulting Company A to accelerate without compensation and that Company can terminate for default due to Consulting Company A delays. Consulting Company A **may want to (1) add language that makes the completion dates goals and/or (2) add a no damage for delay clause and/or (3) revise the waiver of consequential damages and limitation of liability so that those provisions apply to any delay claim even if the delay results in a termination for default.**
6. The agreement does not specifically allow Consulting Company A to charge interest or suspend work for nonpayment, does not require Company to give notice of disputed invoices and allows Company to withholding payment based upon a claim or offset against Consulting Company A (19.2). Consulting Company A **may want to incorporate language similar to 3.2 and 3.3 from its General Provisions.**
7. The agreement provides that Company will own all documents (6). Consulting Company A **may want to retain ownership of its work.**  
The agreement provides that any reuse will be at Company's risk but does not state that Company will indemnify Consulting Company A from any third party claim arising out of reuse. Consulting Company A **may want to add language where the Company indemnifies Consulting Company A from any claim arising out of reuse similar to 7.1 of its General Provisions. Also, Consulting Company A may want to add language similar to 7.2 with regard to electronic files.**

### COMMENTS REGARDING SPECIFIC PARAGRAPHS

- 4 Provides that the work shall be performed in accordance with the Agreement (Professional Services Agreement) which includes the General Conditions and that if there is any conflict, the Agreement controls. **I have not received or reviewed any Professional Services Agreement.**
- 3.1 Requires Consulting Company A to coordinate with others so as not to delay timely completion of the Project. Consulting Company A **may not want to agree to this provision.** Consulting Company A **may want to add language that makes the completion dates goals not firm deadlines, also even if Consulting Company A is willing to commit to its deadlines, it may want to limit its obligation to meeting its deadline and not agree to any deadlines regarding the completion of the project as a whole.**
- 4.2 Requires Consulting Company A to comply with "Company's Code of Conduct." Consulting Company A **may want to obtain and review this document so it knows what it is committing to.**
- 4.6 States that if Company determines Consulting Company A is failing to comply with laws, Company can direct Consulting Company A to stop and Consulting Company A will bear all costs unless "Company" ultimately deems the work stoppage was unnecessary then Company will bear the cost. Consulting Company A **may not want the Company to have the discretion to determine whether work stoppage was unnecessary.**

- 6.1 Provides that documents become sole exclusive property of Consulting Company A. Consulting Company A **may want to retain ownership of its work.**
- 6.2 The agreement provides that any reuse will be at Company's risk but does not state that Company will indemnify Consulting Company A from any third party claim arising out of reuse. Consulting Company A **may want to add language where the Company indemnifies Consulting Company A from any claim arising out of reuse similar to 7.1 of its General Provisions. Also, Consulting Company A may want to add language similar to 7.2 with regard to electronic files.**
- 8.2 Requires Consulting Company A to comply with all provisions of Company's plant, project, facility or site policies. Consulting Company A **may want to obtain and review these policies so it knows what it is committing to.**
- 9.1 Provides that time is of the essence. Consulting Company A **may want to add language that makes the completion dates goals not firm deadlines.**
- 9.2 Requires Consulting Company A to adhere to schedule and allows Company to reschedule order and rate of progress. Consulting Company A **may want to add language that makes the completion dates goals not firm deadlines. Consulting Company A may not want to allow Company to reschedule or if it does, Consulting Company A may want to add language that Consulting Company A is entitled to payment for any additional charges caused by the rescheduling.**
- 9.4 Allows Company to order Consulting Company A to improve its progress if Consulting Company A falls behind schedule. Also allows Company to terminate Consulting Company A for cause for falling behind schedule. Consulting Company A **may want to add language that makes the completion dates goals not firm deadlines or at a minimum, OA may want to delete the language that allows Company to terminate for cause due to delay. If Company is allowed to terminate for cause due to delay, Consulting Company A may want to revise the waiver of consequential damages and limitation of liability provisions so that they apply even if Consulting Company A is terminated for cause. Otherwise, Consulting Company A could face consequential damages as a result of its delay.**
- 9.6 Requires Consulting Company A to provide notice within 5 days if Company causes delay. Consulting Company A **may want to negotiate for more time than 5 days.**
- 10.2 States that Consulting Company A cannot assert unknown condition as excuse or as the basis of a claim. Consulting Company A **may want to delete, it may not want to be responsible for conditions which it did not discover or which were not reasonably discoverable.**
- 11.2 Requires Consulting Company A to review the work of other contractors if Consulting Company A's work depends upon their work and requires Consulting Company A to notify company of any defects. Consulting Company A **may want to add language that it shall report defects in such work "of which Consultant becomes aware or of which Consultant reasonably should have become aware."** Consulting Company A **may not want to be responsible to notify of defects of which it is not aware.**

Also states that failure to review and report any discrepancies Consulting Company A may discover constitutes acceptance and Consulting Company A bears all costs of rendering the other work suitable. Consulting Company A **may want to revise as follows:**

"... discrepancies or defects it ~~may discover~~ discovers or reasonably should have discovered..."

- 12.1 **References "Contractor" I believe this is a typo and it should be "Consultant".**
- 14.2 Requires Consulting Company A to give notice of increase or decrease in cost due to Change Order within 5 days. Consulting Company A **may want to negotiate for longer time than 5 days.**
- 14.4 Provides that Consulting Company A's failure to provide notice within 5 days waives any claim for increased cost.

- 15 Allows Company to suspend Consulting Company A's work at any time and provides that Consulting Company A's compensation for suspension is a standby charge, actual mobilization and demobilization costs and any increased cost incurred by Consulting Company A. Requires Consulting Company A to request reimbursement within 45 days following termination of the suspension.
- 16.1 Provides that Consulting Company A warrants its work for 12 months.
- 16.2 Provides that if Consulting Company A's work is defective, Consulting Company A will be responsible for any resulting costs including cost of removal, reinstallation etc.
- 17 Deals with insurance. **I did not review.**
- 19.2 Allows Company to withhold payment due to disputes. Consulting Company A **may not want to agree to this and may want to incorporate language similar to 3.2 and 3.3 from its General Provisions.**
- 19.6 Provides that Consulting Company A's acceptance of final payment releases any claims against Company. Consulting Company A **may not want to agree to this provision and may want to revise to say any claim is waived if it is not asserted before acceptance of final payment. If Consulting Company A accepts this provision, it needs to make sure that it does not accept final payment until all claims are resolved.**
- 23.1 Allows Company to terminate for convenience.
- 23.2 Provides that if Company terminates for convenience it will pay Consulting Company A for work completed but that no amount shall be allowed for anticipated profit on unperformed work. Consulting Company A **may want to add language that specifically allows for profit and overhead on work completed.**
- 24.1 Allows Company to terminate for default including failure to make progress so as to endanger timely completion of the work. Provides 5 days to cure. Consulting Company A **may want to revise so it cannot be terminated for default for "endanger timely completion of the Work." May not want to commit to any deadlines or if it commits to deadlines, may want to revise so it can only be terminated for default if it fails to meet a specific deadline. If Company is allowed to terminate for cause due to delay, Consulting Company A may want to revise the waiver of consequential damages and limitation of liability provisions so that they apply even if Consulting Company A is terminated for cause. Otherwise, Consulting Company A could face consequential damages as a result of its delay. Consulting Company A may want to have more than 5 days to cure.**
- 24.4 Provides that if Company terminates for default and Consulting Company A is not in default, the termination is deemed a termination for convenience. Consulting Company A **may not want to agree to this provision, it may want to be able to assert damages for wrongful termination.**
- Paragraph 24 Does not specifically discuss what Consulting Company A would be paid if it was terminated for default. Consulting Company A **may want to add language that if there is any of the contract price still unpaid after the default is cured, Consulting Company A is entitled to the unpaid amount.**
- 25.3 Allows Company to disclose confidential information (i) to its attorneys, etc, (ii) pursuant to law (iii) third party consultants etc as long as third parties agree to confidentiality provisions. **There is no similar language allowing Consulting Company A to disclose under these circumstances and Consulting Company A may want that language added.**
- 25.4.4 References 18 CFR part 388. **I did not review.** Consulting Company A **may want to review and confirm it will comply.**
- 26 Requires Consulting Company A to give notice of any claim within 10 days or such claim is waived. Consulting Company A **may want to try to extend the time to longer than 10 days.**
27. Requires OA to indemnify Company. Does not require Company to indemnify OA. **OA may want to try and insert its standard indemnification provision from its General Provisions. In the alternative Consulting Company A may want to revise as follows:**

Consultant agrees to defend, indemnify, save and hold harmless Company, its officers, directors, employees, representatives and agents, against all third party claims and liability relating to personal injury, including death or property damage, to the fullest extent allowed by Applicable Law, including but not limited to reasonable attorneys' fees, settlement fees, costs of investigation and defense arising out of, or in any way connected with the Work and Consultant's (and all of its Subcontractors') negligent performance, wrongful act(s) or omission(s) or breach of performance, under and pursuant to the Agreement and any Purchase Order(s) but only to the extent that Consultant is responsible on a comparative basis of fault. ~~Consultant's indemnification obligations shall include, without limitation, claims, damages, penalties, forfeitures, suits, losses and/or demands arising from (i) claims by third parties for loss or damage to property or personal injuries, including death, or (ii) claims for remediation of natural resources damage other environmental response costs of any kind, or (iii) claims for any violation of Applicable Law, arising out of, in any way connected with, or resulting from Work. Without limiting the generality of the foregoing, claims for which Consultant may be or is alleged to be liable shall apply to the indemnity provisions hereof. Liability caused by the solely negligent or intentional acts of Company, its officer, employees or agents shall be the responsibility of Company but only to the extent of that liability. The indemnification obligations hereunder are not limited by insurance coverage.~~

- 29.1 Provides that Company shall not be liable to Consulting Company A for consequential damages and that Company's liability will not exceed the dollar amounts paid under approved invoices.
- 29.2 Provides that Consulting Company A shall not be liable to Company for consequential damages etc. Consulting Company A **may want to specifically reference delay damages**.

Further provides that the waiver of consequential damages does not apply to indemnification claims or if the agreement is terminated for default. Consulting Company A **may want to delete the exclusion regarding termination for default**. Consulting Company A **may want the waiver of consequential damages to apply even if Consulting Company A is terminated for fault**. **Particularly since Consulting Company A can be terminated for fault as a result of delays**.

- 29.3 Provides that Consulting Company A will not be liable for damages that exceed twice the value of the work. Consulting Company A **may want to revise to one time the value instead of twice**.

Also provides that the limitation of liability does not apply to indemnification claims, termination for default or breach of warranty. **These three exclusions basically nullify the limitation. There are not many claims (if any) that will fall outside the limitations**. Consulting Company A **may want to delete the exclusion regarding termination for default and breach of warranty**. Consulting Company A **may want the limitation of liability to apply even if Consulting Company A is terminated for fault or if there is a warranty claim**. **Particularly since Consulting Company A can be terminated for fault as a result of delays**.

- 32 Consulting Company A cannot assign or subcontract without written permission and any subcontractors must be bound by the terms of the Agreement. **32.2 references "Contractor" I believe this is a typo and it should be "Consultant"**.
- 34 Provides obligations regarding Data Security. Consulting Company A **should confirm that it can and will meet all the obligations**.
37. Provides that Consulting Company A will not use the project as publicity unless it obtains written approval.

Attachment 1 Provides Diversity requirements. Consulting Company A **should confirm that it can and will meet all the obligations**.

The Consulting Company A survey, interview and case studies show that those working with contracts and other common project forms usually have a limited understanding of standard industry forms and

methods for modifying them. Some employees are somewhat familiar with standard forms, and Consulting Company A's attorney possesses the necessary understanding to use the forms as intended by their makers.

However, the attorney's interview indicates he considers suggesting the use of standard forms as an alternative to unacceptable forms provided by potential client to be inappropriate. The case studies further illustrate this, and highlight that the attorney focuses almost exclusively on recommending the use of Consulting Company A standard forms and language. He believes strongly in the adversarial process, and considers any suggesting anything other than the language most beneficial to the client inappropriate. If a situation arises in which the insistence of the use of Consulting Company A's standard language is not accepted by the client, and will result in the loss of the contract, the attorney considers it a "business decision" Consulting Company A's must make whether to use any language other than its standards. Therefore, an attorney's suggestion for the use of standard forms in any way as a negotiating or dispute resolution tool is considered inappropriate by Consulting Company A's attorney even though he acknowledges it may be useful for the "business decision" makers to suggest.

A noteworthy aspect of regular business operations within Consulting Company A is that the "business decision" makers for individual projects are rarely if ever the select few who have a thorough understanding of legal aspects of the industry. As illustrated in the case studies the line of communication includes the project manager, sometimes the project manager's team leader, the firm's internal legal counsel, its insurer and sometimes the attorney contracted by Consulting Company A if the project manager specifically asks for a legal review. The reason the attorney is not regular involved is apparently simply to avoid his fees whenever possible. (During the interview the attorney mentioned that Consulting Company A executives have directed him to reduce his comments.)

Also, when project managers send forms to Consulting Company A legal counsel for review they rarely are forwarded to the attorney. Instead, the insurer's review is normally the only information provided to the project manager, who is left to assume there are no other issues other than those provided by the insurance company. However, the insurance review is just that- a review of the form's language as it relates to insurance matters, and nothing further. Only if the manager specifically requests the form be sent to Consulting Company A attorney is a legal review provided. Although a survey was not conducted, conversations with various employees indicate that the only person who provides legal reviews is the Consulting Company A employee serving as legal counsel. Therefore, it is highly unlikely they would request the form be sent to the attorney even if a legal review were desired. In none of the

case studies reviewed did the Consulting Company A legal counsel provide comments to forms, rather she seemed to rely wholly on the review of the insurer or the contracted attorney. Therefore, legal reviews are rarely conducted on questionable forms even though managers assume they are.

Although the attorney recognizes the potential usefulness of industry standard forms as a negotiating tool when agreement on appropriate language isn't reached and for small projects he does not consider it his place to suggest their use. And, the other select few within the company whom the attorney views are capable of recognizing the appropriate instances to suggest the use of standard forms are not included in the lines of communications.

Therefore, the survey, interview and case studies illustrate that few if any within Consulting Company A would be opposed to using standard forms in some instances as recommended by industry experts. However, those individuals that project managers rely on for legal advice, and who possess the expertise needed to determine when to suggest the use of standards form, are either not involved in the communications or do not consider it their place to make such a suggestion.

## **Section 4: Conclusions**

Consulting Company A employees and its contracted attorney generally have sufficient knowledge of standard forms to use them as intended by industry experts, but the project management operations and the legal review system within the company inhibit their use. Also, there is apprehension by some to use standard forms in acceptable instances, because it could possibly lead to their further use.

Consulting Company A's legal counsel chooses to focus on encouraging the use of the standard contract form it has developed. Therefore, despite a basic understanding of the existence and purpose of standard forms, Consulting Company A generally confines its negotiations to working with the internally developed forms or those provided by clients, even when issues exist with both of these forms that are likely to result in losing the project.

The research indicates that Consulting Company A is not opposed to using standard forms in some instances as recommended by industry experts. These instances include when clients provide their own forms that inappropriately represent the consulting relationships Consulting Company A engages in, and when worthwhile projects would otherwise be lost because agreement cannot be reached with clients regarding form language.

There are several measures Consulting Company A could implement to encourage the uses of standard forms that it believes are beneficial. The first is to determine who the appropriate persons are to make the decision to use forms other than those produced internally.

The following brief review of the current management responsibilities is useful to suggest which positions should fill this role: Project managers are encouraged to use Consulting Company A forms, and are given explicit instructions regarding which areas may be modified. Training is provided to project managers through Consulting Company A's insurer regarding drafting and negotiating contract language risk. This training is clearly intended to be utilized for forms produced by others, because almost all of the training topics involve language not to be changed within Consulting Company A's standard forms. The case studies also clearly indicate that Consulting Company A regularly uses forms produced by others.

Therefore, legal counsel's suggestion for project managers to only use internally developed forms, or their language is not consistent with the company's normal operations. Considering the large number of

projects the company engages in, it is also not practical to expect a select number of individuals to approve the use of every project contract form not produced internally. If Consulting Company A is to continue its normal operations of having project managers and team leaders make final decisions regarding negotiations and execution of forms produced by others they should be aware that the company's legal counsel prefers the use of standard forms in the instances described above.

A logical alternative to either having all those involved with contracts or only a select few determine when to use forms provided by others is to require department manager level determination. The second measure which could be implemented is department manager training of standard forms including the inherent biases of the organizations producing them, the proper documentation methods for modifying them, and the appropriate instances to suggest their use or reference their language during negotiations.

The book "Managing Risk Through Contract Language," other similar material could also be provided to department managers, which gives details suggestions for which forms to use in various circumstances. According to the Consulting Company A attorney interviewed the company has directed him to reduce his comments. For the instances appropriate for the use of standard forms discussed in this paper it is likely the time and comments spent by the attorney would be reduced if department managers had suggested their use. Based on the surveys, case studies and interview it is likely the use of standard forms as a negotiating alternative would be utilized as recommended by industry experts if basic training were provided.

It is also recommended that Consulting Company A direct its attorney to inform project managers when the use of standard forms would be an acceptable alternative to consider. In this way the attorney would not be making the business decision that must be made by the project manager, but would be informing them of acceptable options.



## **Section 5: Suggestions for Additional Work**

Suggestions for future research building on the research conducted for this paper include researching other companies of similar size to validate that the findings within Consulting Company A apply to most small to mid-size consulting companies.

Comparisons of the larger company's use of standard forms with small or mid-size firms could also be useful as indicator of the basic differences in the ways that companies view and manage risk. For example, it could be determined whether smaller companies are as concerned with the relative risks associated with smaller contracts, since the cumulative effect of many small contracts are equal if not greater than the risks of larger company projects.

A financial analysis of Olsson Associates is included in Appendix B for categorizing Consulting Company A as a small or mid-size company. The company overview provided in the Section 3 will also be useful in making comparisons.

## **Appendix A**

### **AIA Contract Documents Synopses**

## AIA Contract Document Summaries

The AIA Documents Synopses is a quick reference for determining the appropriate uses for each of the contracts administrative forms published by the American Institute of Architects. That purpose naturally presumes independent judgment on the reader's part, as well as advice of counsel. This introduction is intended to provide an overview for readers who are not yet familiar with the AIA documents.

There are over 75 AIA contracts and administrative forms in print today. The ancestor of all of these was the Uniform Contract, an owner-contractor agreement, first published in 1888. This was followed, in 1911, by AIA's first standardized general conditions for construction. The 1997 edition of AIA Document A201 is the fifteenth edition of those general conditions.

Many Practices common in the construction industry today became established through their inclusion in AIA's general conditions and its other standardized documents. Arbitration, the one-year correction period, and the architect's role in deciding disputes are just three of these. And while the AIA documents have had a profound influence on the industry, the influence also runs the other way. The AIA regularly revises its documents to take into account recent developments in the construction industry and the law. New standardized documents for design/build and for different types of construction management have been published in recent years, and documents for international practice are now under consideration.

Because the AIA documents are frequently updated, users should consult an AIA component chapter or obtain a current copy of the AIA Contract Documents Price List to determine the current editions.

The documents' relationship to the industry influencing it, and in turn being influenced by it-is paralleled by their relationship to the law. The AIA documents are intended for nationwide use, and are not drafted to conform to the law of any one state. With that caveat, however, AIA contract documents provide a solid basis of contract provisions that are enforceable under the law existing at the time of publication. Case law on contracts for design and construction has for the past century been based largely on the language of AIA standardized documents and contracts derived from them. These court cases are listed in *The American Institute of Architects Legal Citator*. Recent cases are summarized, and all cases are keyed to the specific provisions in the AIA documents to which they relate.

Sample copies of many of the current AIA documents are contained in *The Architect's Handbook of Professional Practice*. Other material of interest in the Handbook includes commentaries on AIA Documents A201 and B141. A section entitled "The AIA Documents: An Overview" provides a useful review of the document "families." These groups of documents are coordinated to tie together the various legal and working relationships on the same project types. Documents within the same family are linked by common terminology and procedures, and may also adopt one another by reference. The relevant terms of A201, for example, are adopted by reference in A101, A111, A401, B141, B151, and C141.

The listings in the Synopses are organized according to letter series, a system of classification that cuts across the various families and refers to the specific purpose of each document. The letter designations indicate the following:

[A-Series—owner-contractor documents](#)

[B-Series—owner-architect documents](#)

[C-Series—architect-consultant documents](#)

[D-Series—architect-industry documents](#)

### G-Series—architect's office and project forms

The preceding paragraphs contain several references to "standardized documents," a term that covers most AIA documents. AIA standardized documents are intended to be used in their original, printed form. Much of the efficiency these documents bring to a transaction depends on their being used in this way: people with experience in the construction industry are familiar with them, and can quickly evaluate the proposed transaction based on the modifications made to the standardized document — if those modification stand out. If modifications are blended into text of these documents that has been retyped or scanned, this advantage is lost.

The modifications themselves may be derived from another type of document published by the AIA. These are model documents, whose language is intended to be reproduced and adapted by users. One such repository of model text is A511. It is intended for use in developing supplementary conditions, an important component of the contract for construction. B511 serves a similar purpose with respect to owner-architect agreements.

AIA documents are currently available in both printed and electronic format. The software package AIA Contract Documents; Electronic Format for Windows enables users to access and print out the AIA documents. Modifications are clearly shown; deleted language appears with strike-throughs, and added language is underscored. Systems requirements for Version 2.5 of this software are: 486 or faster PC

AIA documents in printed form may be obtained from AIA Potomac Valley at this site by downloading the order form. The software package AIA contract Documents: Electronic Format for Windows may be obtained by calling (800) 246-5030.

## **Appendix B**

### **Consulting Company A Financial Review**

**(Section Removed in Published Version)**

## **Appendix C**

### **Case Studies Correspondences and Forms**

**(Section Removed in Published Section)**

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